No. 89-1671

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CITY OF COLUMBIA and
COLUMBIA OUTDOOR ADVERTISING, INC.,

Petitioners,

vs.

OMNI OUTDOOR ADVERTISING, INC.,

Respondent.

RESPONDENT'S BRIEF

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RESTATED QUESTIONS PRESENTED

1. Does a jury verdict establishing economic injury to Respondent caused by subversion or circumvention of municipal government process sustain a judgment against the Petitioner corporation and/or municipality under the co-conspirator exception to Parker v Brown, and/or the sham exception to Noerr-Pennington?

2. Does a jury verdict establishing economic injury to Respondent caused by corruption of municipal government process sustain a judgment against the Petitioner corporation and/or municipality under the co-conspirator exception to Parker v Brown and/or the sham exception to Noerr-Pennington?

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CITY OF COLUMBIA and
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Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition for a Writ of Certiorari did not cite to or make reference to the First Amendment to the Constitution, although Petitioners now attempt to rely upon it. (Pet. Brief at 2).

STATEMENT

This case was tried under the antitrust laws of the United States based upon the actions taken by Columbia Outdoor Advertising, Inc. (COA) to keep and further its monopoly power in the City of Columbia, South Carolina. Central to COA's illegal activities was a pre-1981 secret agreement between COA and the City of Columbia to the effect that the City and COA would use their respective powers to ensure COA favored City Council members as it kept its monopolist position in the Columbia outdoor advertising market. OMNI in both late 1981 and early 1982 tried to enter the Columbia market only to have COA and the City rise up against it at every turn leaving OMNI ruined and COA as the monopoly billboard power in the Columbia market.

The City now wants to say that they have immunity to conspire and to follow a proven course of action to ruin OMNI and protect COA. COA wants to say it can with immunity conspire with the City, steal sign locations and generally use its agreement with the City and its monopolistic powers to ruin OMNI. No such immunity under any doctrine is recognized or warranted.

1. The Verdict.

After hearing fifteen (15) days of testimony and reviewing over 220 exhibits, and after receiving instructions on the law, to which no proper or relevant objections were made by Petitioners, a jury of twelve returned a unanimous verdict in favor of Respondent as follows:

"Do ycu find that the Defendants, Columbia Outdoor Advertising, Inc., and the City of Columbia conspired in restraint of trade against the Plaintiff, OMNI Outdoor Advertising, Inc. Answer: Yes." (Court of Appeals Joint Appendix [Tr.] at 2502).

"Do you find that the Defendants, Columbia Outdoor Advertising, Inc., and the City of Columbia conspired against the Plaintiff, OMNI Outdoor Advertising, Inc., to monopolize the outdoor advertising market in Richland and Lexington Counties? Answer: Yes." (Tr. at 2502 - 2503).

The jury went on to render general verdicts against COA as follows:

Count I: $600,000 actual damages
Count II: $400,000 actual damages[1]
Count III:$ 11,000 actual damages[2]

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[1] The jury was also instructed on monopolization and attempted monopolization; see J.A.____ [Tr. at 2497-9,-30 to 36 (esp. 33), -37 to 42 (esp. 41)]. The jury was instructed that a finding of monopolization or attempted monopolization could rely solely upon the actions of Columbia Outdoor Advertising, Inc. ("COA"). Id. at -33, -41. It thereafter returned a general verdict on Count II, which was the conspiracy to monopolize, attempted monopolization and monopolization count, in the amount of $400,000.00. Findings of conspiracy to monopolize, attempted monopolization and monopolization are all therefore embraced in the jury's general verdict on Count II. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962). No issue regarding the attempted monopolization and monopolization aspect of Count II is before this Court. Therefore, the verdict on that count, with trebling and interest, rests equally upon grounds not challenged before this Court and should not be disturbed. Id.

[2] The jury found that the Petitioners violated the South Carolina Unfair Trade Practices Act and awarded $11,000.00 for that violation. The Fourth Circuit reinstated this verdict also, instructing the District Judge to exercise his discretion pursuant to law regarding trebling and attorney's fees. Since this was clearly an authorized verdict under South Carolina law (See Bocook Outdoor Media, Inc. v Summey Outdoor Advertising, Inc., 294 S.C. 169, 363 S.E.2d 390 (Ct. App. 1987) (outdoor advertising industry was not exempted from S.C. Unfair Trade Practices Act, which clearly provided

With the rendering of the jury verdict, it is clear that all disputed questions of fact have been resolved in Respondent's favor.[3] Courts reviewing a jury verdict therefore take as true all evidence for the prevailing party, make all reasonable inferences favoring the prevailing party that are allowed by the jury instructions, and disregard all countervailing evidence. Sunkist, 370 U.S. at 25-27; Gold v National Savings Bank, 641 F.2d 430, 434 (6th Cir. 1981); Schultz and Lindsay Construction Co. v Erickson, 352 F.2d 425, 430 (8th Cir. 1965).

In reviewing jury verdicts rendered under federal statutes this Court applies the same standards:

> this Court has repeatedly held that where "there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. Only when there is a complete absence of probative facts to support the conclusion reached [by the jury] does a reversible error appear."

Dennis v Denver & Rio Grande Western R.R. Co., 375 US 208, 210 (1983) (FELA case) (citations omitted). Faithful to these standards of deference to a jury's considered verdict, this Court in antitrust cases treats all disputed questions of fact as being resolved in favor of the prevailing party, Texaco, Inc. v Hasbrouck, _____U.S._____, 110 S.Ct. 2535, 2538 (1990); infers

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for trebling of damages), it also should stand in all events; finally, the Unfair Trade Practices matter was not brought before this Court on the certiorari petition.

[3] Petitioners do not challenge the sufficiency of the evidence supporting the verdict and certiorari was not granted to review the sufficiency of the evidence.

that the jury found for the prevailing party on all theories presented by the jury charges, Sunkist, 370 U.S. at 25-27; and upholds the jury's verdict absent a fatal legal error in the jury charges to which a proper and timely objection was made. Id. The Fourth Circuit majority applied these standards in reinstating the jury's verdict here. (Pet. App. 3a, 17a, 23a)[4].

2. The Jury Charges.

The permissible -- indeed mandatory -- inferences from the jury verdict are drawn from the relevant jury charges. Sunkist, 370 U.S. at 25-27. The jury in this case was charged that Petitioners could be found liable if they had participated in an "illegal arrangement" or an "illegal agreement" or had agreed to "violate the law, or to accomplish an otherwise lawful result in an unlawful manner." J.A.____ [Tr. at 2497-26,27]. If they found that Petitioners procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of Respondent to the market pursuant to a conspiracy, then the jury was charged that it could find liability for that reason as well; J.A.____ [Tr. at 2497-29].[5] Finally, the jury was instructed that liability could flow

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[4] "Pet. App." designates pages to the Appendix to the Petition for a Writ of Certiorari.

[5] The Petitioners neglect to point out that the underlined material was part of this portion of the jury charges. Because of that important aspect of the jury charges, the jury was not permitted to hold Petitioners liable if it found only that COA lobbied for anticompetitive legislation.

from a finding that, pursuant to a conspiracy, Petitioners foreclosed Respondent "from meaningful access to a legitimate decision making process with regard to the ordinances in question." (Id.). The Fourth Circuit correctly noted there were no proper objections made to the jury instructions.[6] (Pet. App. 37a). Not only did Petitioners fail to follow Rule 51 of Fed.R.Civ.P. concerning objections to jury charges, supra. n. 6, but they also proposed an alternative instruction to the District Court, which set forth basically the same legal principles as used by the District Court in its instructions, J.A.____ [Tr. at 2497-26, -27, -29] and the Fourth Circuit in its reasoning. (Pet. App. 12a). Instruction #18 requested by Petitioners reads in relevant part

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[6] Columbia Outdoor Advertising (COA) objected to what it thought was an instruction that Petitioners could be held liable simply if COA had lobbied for anticompetitive legislation. J.A.____ [Tr. at 2497-70,-71,-72]. No such instruction was given. (See supra n.5). The District Court responded.

> I am a little concerned about the possibility that I said that lobbying itself may be a conspiracy. If I said that, I am certain that I was wrong, but if I said that activity was pursued for the purpose or in furtherance of a conspiracy, then it wasn't protected. J.A.____ [Tr. at 2497,-73,-74] (emphasis supplied).

The District Court's statement makes it clear that this instruction pertained to the co-conspirator exception to Noerr-Pennington, which was not reached by the Fourth Circuit. (Pet. App. 24a). No issue regarding the instructions on the "sham" interpretation of Petitioners' conduct was preserved by objection. The Petitioners vigorously, indeed, opposed the idea that their conduct was in fact sham (see, particularly, closing arguments for the City and for COA, (Tr. at 2398-2420, 2450-2477)) and were content to let the matter go to the jury.

that it would be wrong if there were:[7]

> illegal agreement . . . for the specific purpose of damaging OMNI's business or for the specific purpose of either obtaining a monopoly in favor of COA or maintaining such a monopoly in COA's favor.

Neither the majority nor the dissent in the Fourth Circuit found the jury instructions to be erroneous as a matter of law. The Fourth Circuit majority analyzed the instructions and verdict and drew "necessarily reflected" inferences (Pet. App. 23a) that (1) the City was not acting pursuant to the direction or purposes of the South Carolina statutes but conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry[8] (Pet. App. 9a); (2) the contacts and agreements here did not relate to the purpose of attaining governmental action but solely to forcing competitors from a particular market (Pet. App. 12a); (3) "COA's interaction with the mayor, City Administrators, and members of the Council 'was actually nothing

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[7] At J.A.____ [Tr. at 2497-73] is a discussion of Instruction #18 in District Court which is set forth in full at J.A.____.

[8] Respondent should point out that it has taken the position that zoning laws do not constitute the kind of Town of Hallie v City of Eau Claire, 471 U.S. 34 (1985) authorization to engage in anticompetitive activity that they were found to be by the Fourth Circuit. The South Carolina Zoning Enabling Acts are neutral police power enactments that do not contemplate authorizing anticompetitive activities. Lobbying of an entity which could not legally do what was being requested would obviously not be protected activity under any reading of law. Thus, such lobbying, even if it were restricted to wholly aboveboard, legitimate activity, would give rise to liability since there would just be no Parker issue involved.

more than an attempt to interfere directly with the business relations of a competitor or an attempt to harass and deter OMNI . . . [and] that COA's purposes were to delay OMNI's entry into the market and even to deny it a meaningful access to the appropriate city administrative and legislative fora. The evidence, for example, supports inferences that COA instigated the Council's enactment of an unconstitutional ordinance even though the city attorney had advised [the Council] of its probable unconstitutionality, and that COA encouraged the City's later instruction to its attorney to proceed with litigation to stall until a moratorium could be enacted" (Pet. App. 22a); and (4) "the jury verdict . . . necessarily reflected its findings that COA's actions were a 'sham' and, construing the evidence with appropriate deference to the verdict, it supports that finding." (Pet. App. 23a).

Petitioners argued to the jury that liability could be based only upon corruption:

> "Don't misunderstand this case. This case is a case where the claim is government corruption. Government corruption, an illegal arrangement, the partnership in crime. I submit to you ladies and gentlemen that just cannot be found." (Tr. at 2476-77).
>
> "This is what the case is about; corruption" J.A.____ [Tr. at 2448].

The Petitioners went on to say:

> "This is a case of government corruption. No matter how you slice it." J.A.____ [Tr. at 2449].[9]

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[9] No charge using the word "corruption" was requested nor was any charge objected to because of a lack of a corruption test, all in violation of Rule 51 Fed.R.Civ.P.

Inferences concerning corruption, therefore, reasonably can be drawn from the jury verdict, in view of (1) Petitioners' jury argument, (2) the instructions which authorized liability if Petitioners had entered into an "illegal arrangement" or an "illegal agreement," and (3) the evidence. The Fourth Circuit itself recognized that the inferences it set forth in the majority opinion were only by way of "example." (Pet. App. 22a).

The range of inferences available from the jury verdict is revealed by the jury instruction. The jury was specifically instructed that it could not hold Petitioners liable if it found: that they had engaged in "legitimate lobbying" J.A.____ [Tr. at 2497-27, -28, -29]; "[j]oint efforts truly intended to influence public officials to take official action" J.A.____ [Tr. at 2497-26], or "concerted . . . effort[s]... genuinely to influence public officials," J.A.____ [Tr. at 2497-25]. Thus the jury's general verdict cannot, under any circumstances, give rise to inferences that the jury premised Petitioners' liability on any of these "legitimate" activities. Indeed, Petitioners' closing arguments made it clear that anything short of corruption was "legitimate."

The jury was instructed that it could hold Petitioners liable if it found the following:

i. an "illegal arrangement" or "illegal agreement" J.A.____ [Tr. at 2497-26,-27].

ii. efforts by Petitioners to "violate the law, or to

accomplish an otherwise lawful result in an unlawful manner" J.A.____ [Tr. at 2497-26].

iii. "procure[ed] and [brought] about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the acess of the plaintiff" to the market pursuant to conspiracy. J.A.____ [Tr. at 2497-29].

iv. a conspiracy between the Petitioners "with the intent to foreclose the [Respondent] from meaningful access to a legitimate decision making process with regard to the ordinances in question" J.A.____ [Tr. at 2497-29].

Given the jury's general verdict, the District Court's instructions and the Petitioners' jury argument, it is only reasonable to infer that the jury could have found that Petitioners had participated in, for example, an "illegal agreement," "illegal arrangement" and/or "efforts to violate the law, or to accomplish an otherwise lawful result in an unlawful manner." Texaco, 110 S.Ct. at 2538; Cf. Sunkist, 370 U.S. at 25-27. Embraced within such an "illegal agreement" or "illegal arrangement" would be, for example, bribery, coercion and/or kickbacks. Similarly, the jury verdict means that the jury could have inferred personal financial advantage to both COA and the City officials involved, and selfish or otherwise corrupt motives on the part of all Petitioners. Equally within the scope of an "illegal arrangement" or "illegal agreement" would be a finding by the jury of a direct link between what the Petitioners would now call "campaign contributions" (of free or reduced cost, strategic billboard space not reported on campaign contribution forms or on income taxes) and the City's actions. Necessarily, however, the jury's verdict means that the jury found that there was no "legitimate lobbying" in Petitioners'

activities.

All of these inferences from the jury's verdict, as well as others expressly drawn by the Fourth Circuit majority, would have been equally permissible under the instructions requested by the Petitioners. These requested instructions, like the ones given to the jury by the District Court, would have held Petitioners liable for an "illegal agreement" aimed at anticompetitive objectives.

Under Texaco and Sunkist, Respondents are entitled to all of these inferences under the charge and verdict, and under the proof made. All of the scenarios under which the jury was authorized to hold Petitioners liable, moreover, were consistent with Federal antitrust law. Sunkist; see infra at p.29. In any event, Petitioners have lost any basis to challenge the jury charges that authorized these alternative bases for liability, both through their failure to make a timely and proper objection, and through their request for instructions indistinguishable from the law as charged to the jury. See supra nn. 1, 5-6 and infra at p.27-29.

3. The Evidence.

The proof paints a picture that even the dissent in the Fourth Circuit characterized as not being a model for a civics class, and which the jury reasonably found painted a picture of substantial local governmental misconduct resulting in injury to competition and to OMNI. Although the issue is not before this Court, see supra n.3, there is no question but that there is sufficient evidence to support each of the inferences yielded by the jury's verdict.

This is not a case simply about the enactment of two anticompetitive ordinances. Nor is it a case about "legitimate" legislative lobbying. This is a case in which the City of Columbia and COA had a longstanding agreement that the City and COA would each use their respective power and resources to protect against all comers COA's monopoly position in the Columbia market. In return, City Council members received advantages made possible by COA's monopoly.

This agreement was carried out by the City harassing COA's new competition (OMNI); by the City threatening OMNI; by the City allowing COA sign locations while shutting down Columbia to OMNI; by the City threatening and passing moratoriums known to be unconstitutional but asked for by COA; by the City and COA's continuing frivolous litigation involving OMNI purely for delay; by the City giving COA secret inside information as to actions it was about to take; by the City's allowing COA to tailor an ordinance for the City to pass; by excluding OMNI from any legislative process; by COA's interfering with OMNI's receipt of business goods necessary for its operations; by allowing COA tax advantages to the detriment of the City; and by COA's stealing signs from one customer to give to another customer, including politicians.[10]

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[10] A conspiracy, of course, is a partnership, and an overt act of one partner may be the act of all without any new agreements specifically directed to that act. U.S. v Socony Vacuum Oil Co., 310 U.S. 150 (1940), reh'g. denied. 310 U.S. 658 (1940).

Petitioners do not mention the fact that in 1980 COA and the City clearly entered into an agreement whereby the City and COA would do whatever it took to keep COA's competitors out of Columbia. In return COA gave special and beneficial treatment to City officials in their races for City Council. This included free or discounted billboard space as well as strategic and/or stolen billboard locations.

In 1980 another billboard operator, Robert O. Naegele, thought about coming into Columbia because of COA's very dilapidated and outdated plant. (Tr. at 3602-3605). In response to the Naegele threat in 1980 COA got an agreement with the City to pass a restrictive billboard ordinance at any time COA needed it. Mr. Cantey, COA's owner, wrote in a letter:

> The Mayor of Columbia and the four councilmen are very good friends of ours. I discussed your suggestion with the Mayor about reworking our existing sign ordinances and he promptly said, "no problem." My son Jim has begun a study to determine exactly what restrictive measures we should request. (Tr. at 2704) (See also J.A.____ [Tr. at 548-549]).
>
> When confronted with this letter Mr. Cantey said:
>
> You know why I did that? To keep Mr. Naegele out. He was buying everything, Greensville [sic], Spartanburg, Gastonia, Greensboro, Ashville [sic], right all over me. Dooner wasn't even in it. J.A.____ [Tr. at 549].

The jury had ample basis to find an illegal agreement between the City and COA to give COA whatever protection it needed.

In early Fall of 1981 Mr. William Dooner organized and started an outdoor sign company called OMNI. (Tr. at 286). Before then, Mr. Dooner had thought that Columbia would be a good market. (Tr. at 213). Mr. Dooner and his associates made an extensive study of

the Columbia market and concluded that COA, which completely controlled the Columbia market, had an inferior plant. (Tr. at 420, 645-647). They also determined that the regulations and zoning controls were unrestrictive so as to allow them to compete with COA. J.A.____ [Tr. at 213]. With this information, OMNI entered the Columbia market in the Fall of 1981 with a planned leasing effort.

When OMNI decided to enter the Columbia market, COA was in a secure, monopoly position in the outdoor advertising market. (Tr. at 222, 301, 1511). It owned 95% of the outdoor advertising signs in the Columbia market (Tr. at 702).

Once the officers of COA got wind of OMNI's plan, Mr. W. Cantey made trips to investigate how COA could use its agreement with the City to sabotage and stop OMNI. He traveled to Baton Rouge, Louisiana, and Pensacola, Florida. (Tr. at 551, 2710). After discussing COA's competitive situation with his outdoor advertising friends, Mr. W. Cantey wrote in memo after memo that the way to stop OMNI was to call upon COA's agreement with the City for a city moratorium on signs and then get a city ordinance controlling the location of signs so as to allow COA's signs and no one else's. These memos show as follows:

Memo dated 11/3/81 - Pensacola trip

"Get your own ordinance - 500 spacing" "Get city ordinance." J.A.____ [Tr. at 2709].

Memo dated 12/11/81 - visit with Gerry Marchand

"Put in spacing 500' now." "Consider Moratorium."

(R. at 2722).

Memo regarding visit with Naegele in Spartanburg

"Put in sign ordinance as soon as possible. 1,000'."

J.A.____ [Tr. at 2698].

Memo dated 1/5/82 regarding a conversation with Gerry Marchand

"Put in sign ordinance as quick [sic] as possible."

J.A.____ [Tr. at 2703].

Mr. W. Cantey was also told to raise COA's rates by at least 12% in July of 1982. J.A.____ [Tr. at 2698]. COA's rates were raised. (Tr. at 1484, 1532, 1810). Customers of OMNI were told by COA that OMNI was a "fly by night outfit." (Tr. at 508). Additionally, prices were cut and free space given in order to stop OMNI. (Tr. at 1091). One COA official was quoted as saying, "Don't just get 30 day contracts." He explained that he would give away contracts, if the customers bought the paper, just to get the second month of business. (Tr. at 822).

The jury consequently had ample basis to find that COA called upon its 1980 secret anticompetitive agreement with the City in order to illegally stop OMNI. Measures were chosen which would damage OMNI but not COA[11]. (Tr. at 1088).

The jury also considered evidence of the behavior of the Mayor and City Council, which amply supported a finding that they carried

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[11] Distribution of the sign locations is paramount. (Tr. at 195) As Mr. W. Cantey noted, the more good sites a company has, the more bad sites it can support. (Tr. at 1175) Coverage in Columbia is crucial. (Tr. at 879).

out the illegal agreement to protect COA. At one City Council meeting OMNI officials were singled out and unfairly attacked by the Mayor in open session. J.A.____ [Tr. at 224]. On March 24, 1982, City Council and the Mayor passed a moratorium on billboards, banning the construction of billboards within the city limits without Council's express consent. J.A.____ [Tr. at 3616]. They were informed by City Attorney Roy Bates that this action was illegal. J.A.____ [Tr. at 389-390]. The Council passed the moratorium nonetheless and, as was foreseeable to the Council, the State court held that their actions were unconstitutional. J.A.____ [Tr. at 2658-2663]. Frivolous litigation was continued purely for delay. (Pet. App. 22a). Mr. Cantey admitted the ordinances were of benefit to COA. (Tr. at 1173).[12]

Immediately after the first moratorium was declared illegal City Council gave first reading to a second moratorium. J.A.____ [Tr. at 299, 2649]. This had the effect of keeping OMNI's business at a standstill. (Tr. at 1255). The Mayor's direct involvement in this second moratorium is evidenced in a City of Columbia Inter Office Memo. (Tr. at 3204). Even after the judicial declaration of unconstitutionality, the City, continuing its delaying tactics, dragged its feet about permitting OMNI to construct signs for which it had already leased sites. J.A.____ [Tr. at 390-391].

The final restrictive ordinance, passed on September 22, 1982, clearly protected COA. (Tr. at 338-339). This ordinance maintained

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[12] See Pet. App. 14a, 15a.

and strengthened COA's dominant position in the Columbia market. Before passage of this ordinance, OMNI tried to provide input into the process but was consistently thwarted. J.A.____ [Tr. at 393-394], (Tr. at 830-831).

The jury also had evidence, from notes made by City officials after meetings with COA, showing that COA's demands were codified as ordinances. COA demanded that the distance between signs in M-1 and M-2 zones be increased from 750 feet to 1,000 feet, which was accordingly done. J.A.____ [Tr. at 3785]. OMNI objected to having any distance requirement on the opposite side of the streets. COA indicated it had no problem with such a requirement and Council passed it. (Tr. at 2198-99). The jury also heard that the September 22, 1982, ordinance was unreasonably and unusually strict in that it was tailored to ensure that OMNI could not get necessary sign locations in the critical Columbia core area. (Tr. at 835-847). The jury also considered another memo from the City Manager to City Council illustrating unfair bias in favor of COA and how OMNI was foreclosed from access to the governmental process. (Tr. at 3804-3805).

Considerable evidence went before the jury to demonstrate that, from March, 1982, to October, 1982, overt acts were taken in furtherance of an illegal conspiracy between COA and the City. A draft of a moratorium was written by Councilman Patton Adams on the back of an agenda, not the usual way of writing ordinances, the morning of March 10, 1982, the day of the first reading of the moratorium (Tr. at 1901). That day, first reading was given to a

moratorium described in the following:

> Upon motion by Mr. Adams, seconded by Mr. Barnes, Council voted unanimously that no billboards will be constructed in the area bounded by Harden Street, the River, Heyward Street and Elmwood Avenue or in any area where a rezoning has been or shall be proposed, including the Rosewood Corridor area, without the express prior permission of City Council.

J.A.____ [Tr. at 3190].[13]

The jury could have inferred, too, that COA had planned the moratorium and had called upon its agreement with the City from the evidence that on the 9th of March, COA sought and got from the City three new sign locations of which two were in the to-be proscribed area. J.A.____ [Tr. at 3187] (Pet. App. 14a). Indeed, the jury could have inferred that COA wanted, and knew it could get, more from the City because of their agreement. COA had the City pass a more restrictive moratorium. On March 24, 1982, a reworded moratorium was passed J.A.____ [Tr. at 3616]. The day before the final moratorium was changed, Mr. Cantey visited his good friend the Mayor of Columbia at his office, in order to get the city wide moratorium. J.A.____ [Tr. at 3169] (Tr. at 2081).

This moratorium was much more restrictive than the one given first reading on March 10, 1982. While no one took credit for these changes that obviously further protected COA (Tr. at 2190), the jury was free to infer that City Council knew that COA would receive the benefit and intended for it to do so. (Tr. 2170-74, 2190-2209). Councilman Barnes, on cross-examination, noted that

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[13] It is important to note that this draft of the moratorium did not cover <u>all</u> locations in Columbia.

the Mayor and Councilmen Adams and Bennett took an unusual and substantial interest in the moratorium and sign ordinance. (Tr. at 2252). Again COA knew of the upcoming moratorium change, while OMNI did not. - Between March 9, 1982, and March 24, 1982, COA obtained from the City ten new locations in the area to be affected by the new moratorium of March 24, 1982. J.A.____ [Tr. at 3187] (Pet. App. 15a).

From evidence of other events during this period, the jury had still further basis to infer the existence and implementation of an illegal, anticompetitive agreement between the City and COA to protect COA. In a letter of February 10, 1982, Mr. Cantey threatened Mr. Dooner:

> At some point I think City Council will be forced to place some type of stringent restriction on our industry.

(Tr. at 2695).

At the airport in Atlanta Mr. Cantey told Mr. Dooner that he was going to get "1,000 feet spacing." J.A.____ [Tr. at 664].[14] He did just that.[15]

A review of Exhibit 21 J.A.____ [Tr. at 3785] shows that City planners had suggested 750-foot spacing in the critical areas and

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[14] Spacing is the key to being able to compete in the Columbia market core (downtown locations). City Exhibit 19 J.A.____ [Tr. at 3780] shows the small area that was open to billboards. Of course these were the main automobile traffic arteries to Columbia. OMNI's Exhibit 55 J.A.____ [Tr. at 2757] shows the effect of spacing; Columbia was shut down to new billboards. Mr. Cantey knew 1,000 feet spacing would kill OMNI.

[15] See Pet. App. 16a.

only same side spacing. In the final ordinance, Mr. Cantey got his protection: 1,000 feet spacing and opposite side spacing of 500 feet. J.A.____ [Tr. at 3785]. The jury apparently inferred that this protection was pursuant to an illegal agreement, not legitimate lobbying.

Mayor Finlay berated OMNI at meetings J.A.____ [Tr. at 224, 356, 1082] and on the radio. J.A.____ [Tr. at 198]. He made OMNI take down a three dimensional eagle sign, calling it an atrocity. J.A.____ [Tr. at 1082]. The eagle sign said:

"Columbia Your Progress is Soaring" (Tr. at 3315).

He never complained about COA's signs with a three dimensional life-size model of a man with his pants down. (Tr. at 2075-2076). When asked about this the Mayor could give no reasonable explanation. (Tr. at 2073-2076). The eagle sign advertised OMNI. (Tr. at 3315). During this period the City even took actions that allowed COA tax advantages to the City's detriment. J.A.____ [Tr. at 3010, 3092] (Tr. at 1755, 1802-03).

Before the advent of OMNI, in 1979, a company offering minimal competition against COA's big signs came to Columbia. J.A.____ [Tr. at 2065]. The Mayor said he got upset and wrote a memo; but the City did nothing about sign ordinances until OMNI threatened COA's monopoly. (Tr. at 2060-2066, 3786).

The day before the final moratorium, Mr. Cantey had an appointment to see the Mayor. J.A.____ [Tr. at 3169]. The next day, March 24, 1982, the original moratorium was mysteriously

changed so as to be even more restrictive.[16] J.A.____ [Tr. at 3190]. The City then went into a fast track program to pass COA's restrictive permanent ordinance. (Tr. at 1917, 2027). From this, the jury had reason to infer the existence of an illegal and anticompetitive COA-City agreement, which was confirmed by the City's failure to perform the type of study one would expect of government before enacting legislation which the City clearly knew would be anticompetitive (Tr. 2646). However, Mr. Land, a planner, recommended 1,000 feet in C-3, C-4, and C-5; 750 feet in M-1 and M-2; and with no other restrictions except to display area. (Tr. at 3606). From that point, based upon what Jim Cantey of COA had sent to City Council, the City passed an ordinance, not as the planner had recommended, but that in effect froze COA in its monopoly and killed OMNI. J.A.____ [Tr. at 3313, 3785] (Tr. at 1849-1850, 2016-2220, 2189-2200). OMNI was given no input into the process; it was a closed deal, J.A.____ [Tr. at 200], as the jury apparently concluded.

Mr. Cantey, in a meeting concerning the new ordinance, got mad and stormed out saying he would get Council to give him 1,000 feet spacing. J.A.____ [Tr. at 354]. He did that, too. The 1,000 feet spacing closed down the Columbia core area and was the key to any ordinance intended to eliminate OMNI. (Tr. at 872).

A July 20, 1982, memo said that Mayor Finlay wanted to look at any proposed ordinance. (Tr. at 3204). There was a proposal to

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[16] See, Id., 14a - 15a.

limit the display area to eliminate any more painted bulletins (big signs).[17] (Tr. at 3696, 3783). When the final ordinance was passed, display requirements were expanded to allow for these big signs. COA was protected again. The jury apparently asked, "Why was the Mayor so interested and vigorously active at this time?" It apparently found the answer in an illegal agreement between COA and the City.

The jury also had good reason to reject the City's explanations of its actions as inconsistent. Councilman Adams had said billboards were despicable. (Tr. at 1914). The rest of Council said they were against billboards. Yet right in the middle of all this supposed concern and hatred for billboards, on June 16, 1982, upon motion by Mr. Adams, the City granted COA a zoning ordinance change in order for COA to be allowed to build one of those billboards the City so despised. (Tr. at 380, 384, 387, 1221, 1914).[18]

The evidence considered by the jury gave abundant reasons to determine that COA was using the power of its billboard monopoly to favor one politician, particularly an incumbent one, over another. COA gave political discounts (Tr. at 2762-2782, 2821), free advertising (Tr. at 1520), and advantageously, strategically

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[17] The zoning change was for a big sign, the type sign Mayor Finlay wrote a memo about in 1979. (Tr. at 3170)

[18] COA was even given the right to build one of those hated uni-pole signs in a historical zone. (Tr. at 1544)

located space. J.A.____ [Tr. at 1690].[19] The jury was free to apply its common sense in understanding the importance of well-placed billboards in local elections. Certainly, there was evidence before the jury that none of the other kinds of media allowed for targeting specific areas of a city or county: not radio, not television, not newspapers, not magazines, nothing else (Tr. at 1690).

The jury apparently found, for good reason, that COA used that power in political races. In return for discounted billboards, free billboards, and strategically placed billboards, COA expected to be and was paid back by the politicians.

Mr. Cantey said when asked about charging one politician one rate and another a different rate:

> Q. That's not fair, charging one nothing and other ones more than your rate card; is it?
>
> By Mr. McDonald:
>
> Objection as leading.
>
> A. I don't know. Maybe he did him a favor.
>
> Q. Maybe he did him a favor?
>
> A. May be he did him a favor so he compensated by giving him a free board. I don't know if that happened. (Tr. at 1206).

In discussing discounted space to politicians, Mr. Cantey Heath said:

> Q. You would expect her to do the favors you would want

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[19] COA even pasted over other ads which had been paid for so they could display advantageously located ads for their favored politicians. J.A.____ [Tr. at 1690].

Lieutenant Governor Mike Daniel to do for you, too, wouldn't you?

A. I would expect her to help me if I asked for it. (Tr. at 1627).

The Mayor and the Councilmen, so the jury apparently found, agreed to help COA keep out OMNI. It was the payback COA expected for their efforts in the Mayor's and Councilmen's elections.

The picture that the jury saw also included evidence of "double billing" J.A.____ [Tr. at 921] -- a practice that even Mr. Cantey of COA said was stealing. J.A.____ [Tr. at 1179]. This evidence showed the jury a pattern and practice by COA to sell a prime billboard location to a national customer and then resell the same location for the same time to a local customer or politician, covering over the national customer's sign with a local customer's or politician's sign. J.A.____ [Tr. at 921-22].

From all of this, and other, evidence, the jury apparently had little trouble satisfying itself that the evidence did not add up to "legitimate lobbying." Instead, it apparently viewed that evidence as establishing and showing the implementation of a secret agreement between the City and COA to protect by all means COA's monopoly from any future competition.

When challenged by the Petitioners' closing arguments to search for evidence of corruption, moreover, the jury apparently found it. There is clear evidence of corruption in the record if that be needed. The free space or discounted billboard space was received by some Council members as a campaign contribution and not repo[illegible]ed. J.A.____ [Tr. at 2760, 2821, 3216, 3254, 3256] (Tr. at

2056). The free space or discounted space given by COA was not recorded by COA as a contribution. J.A.____ [Tr. 3010, 3034, 3065, 3092]. The recipients of the free or discounted billboards acted very specifically for the benefit of COA J.A.____ [Tr. at 198, 224] (Pet. App. 17a). Before these actions, the City essentially had left the billboard industry (COA) alone. (Tr. at 213, 349) (See supra at p. 19). COA expected favors and help in return for their giving free or discounted strategic and/or stolen sign locations to politicians (Tr. at 1519-25, 1626-27). The jury thought the favors were returned and the actions illegal. See infra p. 39, 43.

SUMMARY OF ARGUMENT

1. Petitioners' conduct at trial waived the questions concerning Parker and Noerr-Pennington they seek to present to this Court. At trial, Petitioners failed to make proper objections to the District Court's legal instructions regarding the co-conspirator exception to Parker and the sham exception to Noerr-Pennington. Petitioners also waived the questions presented to this Court by requesting their own jury instruction that tracks the law as charged by District Court. Petitioners' conduct thus falls within the doctrine of City of Springfield v. Kibbe, 480 U.S. 257 (1987), in which this Court dismissed writ of certiorari as improvidently granted. Petitioners' failure to object to the relevant jury charges and their waiver of their objections through their own requested charges also mean that all potential bases for liability given to the jury are safe from legal attack or further scrutiny in this Court. Sunkist, 370 U.S. at 25-27. In any event, the jury

charges were legally correct and sustain the judgment, as shown next.

2. Subversion or circumvention of the governmental process with anticompetitive results imposes antitrust liability on both a municipality and a private party, notwithstanding Parker or Noerr-Pennington. Parker and Noerr-Pennington do not validate the forfeiture of government to private interests through an agreement to eliminate competition. Thus Parker does not validate the combined illegal conduct of elected officials and private parties, and has a "co-conspirator" exception. Similarly, Noerr-Pennington does not validate "private action" masquerading as governmental action. The doctrines expressly protect only valid governmental action. This is because a municipality has no license from the state to use its delegated powers for purely private economic purposes, and because a private agreement to use governmental powers toward that end makes the governmental process a sham. Proof that Petitioners, for example, conspired solely to further COA's commercial purposes to the detriment of competitors; that Petitioners engaged in private contacts and agreements solely to force competitors from a market and to deny Respondent meaningful access to a relevant government forum -- all as properly inferred from the jury's verdict -- thus sustains the judgment against Petitioners. The First Amendment does not extend to a conspiracy with government.

3. The relinquishment of government's fiduciary responsibility to the electorate also is corruption. If the Court, consequently,

eliminates the co-conspirator exception to Parker, and/or disallows a sham exception[20] to Noerr-Pennington here despite demonstrated subversion or circumvention of the governmental process, then corruption of the governmental process with anticompetitive results alternatively warrants imposing antitrust liability on both a municipality and a private party, notwithstanding Parker or Noerr-Pennington. Consistently, and as reaffirmed recently in Allied Tube & Conduit Corp. v Indian Head, 486 U.S. 492, 504 (1988), this Court has held that "one could imagine situations where the most effective means of influencing governmental officials is bribery, and we have never suggested that that kind of attempt to influence the government merits [antitrust] protection." The jury's verdict, as amplified by the jury charges, and as supported by the concededly sufficient evidence, supplies a finding of this type of corruption -- which Petitioners call "direct corruption" -- as well. Both the dissent in the Court of Appeals and the Petitioners here concede that "direct corruption" of the governmental process -- as shown, for example, by personal financial interest, personal

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[20] The Fourth Circuit wrote:

> "In our view, the jury verdict, in light of the instructions it received from the court, necessarily reflected its finding that COA's actions were a 'sham' and, construing the evidence with appropriate deference to the verdict, it supports that finding. In view of this holding, it is not necessary to consider the issue of whether there is a co-conspirator exception to Noerr-Pennington immunity." (Pet. App. 23a, 24a).

Thus, there is no issue before this Court of whether a co-conspirator exception to Noerr-Pennington applies. See supra n. 6.

bias, bribes or other "illegal acts" -- would sustain the judgment against Petitioners. The District Court's unchallenged instructions and Petitioners' evidence put a jury finding of just such "illegal acts" by Petitioners well within the scope of the jury's verdict. Petitioners' closing jury argument invited such a jury finding. The First Amendment, moreover, does not protect the use of corrupt means to obtain governmental action.

ARGUMENT

I. SUBVERSION OR CIRCUMVENTION OF GOVERNMENTAL PROCESS SUSTAINS THE JUDGMENT

The instructions given by the District Court and the instructions acquiesced in, and requested, by Petitioners clearly allow the jury verdict to stand. Furthermore, the principles of law as to both Parker and Noerr-Pennington as set forth by the Fourth Circuit are correct. Subversion or circumvention of the governmental process, even if not by criminal actions, creates a sham under Noerr-Pennington and amounts to private action unprotected by Parker[21].

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[21] It is only a matter of semantics whether subversion of governmental processes is viewed as preventing Parker immunity from attaching in the first instance, or as invoking the Noerr-Pennington immunity "sham" exception. To be sure, Noerr-Pennington only comes into play if Parker is viewed as initially applying; if the government is shown not to be an independent actor due to involvement of its officers in a conspiracy, however, so that so-called "attempts to influence" its actions are in fact - as here - but "sham" acts in furtherance of the conspiracy, the restraints in question would come clearly under the head of private action. See, e.g., Allied Tube & Conduit, 486 U.S. at 492. To paraphrase Allied Tube, the issues of Parker and/or Noerr-Pennington immunity in this case thus collapse into the issue of antitrust liability.

A. Failure to object properly to jury instructions precludes this Court's review of the Questions Presented by Petitioners.

This Court has refused to consider issues not preserved by proper objection, or otherwise abandoned, in the trial court. In Kibbe, 480 U.S. at 257, the Court dismissed a writ of certiorari as improvidently granted under circumstances almost identical to those presented here. Certiorari had been granted to resolve a question having to do with issues of municipal liability.[22] On plenary consideration, however, the Court found that those issues had not been properly preserved in the District Court, even though the Circuit Court of Appeals had written about them. This Court wrote:

> We ordinarily will not decide questions not raised or litigated in the lower courts. See California v. Taylor, 353 U.S. 553, 556, n.2 (1957). That rule has special force where the party seeking to argue the issue has failed to object to a jury instruction, since Rule 51 of the Federal Rules of Civil Procedure provides that '[n]o party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict." 480 U.S. at 259 (emphasis supplied).

Here, Petitioners did not object properly to the jury charges on both the Parker and Noerr-Pennington issues. See supra at n.6. Indeed, as in Kibbe, Petitioners proposed an alternative instruction[23] that varies in no material fashion from the

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[22] Under Monell v New York City Department of Social Services, 436 U.S. 658 (1978).

[23] Discussed supra at p. 5.

instructions the District Court actually gave. See supra at n.7. From identical conduct by the Petitioners in Kibbe, this Court found a waiver of the questions presented, which precluded Supreme Court review: "it appears that in the District Court petitioner did not object to the jury instruction stating that gross negligence would suffice . . . and indeed proposed its own instruction to the same effect." (Id. at 258).

As in Kibbe, therefore, review of the Petitioners' Questions is precluded and the writ of certiorari should be dismissed as improvidently granted. In any event, however, the Petitioners' failure to object to the Parker and Noerr-Pennington instructions, and their proposal of a charge substantially identical to the ones given, prevent Petitioners from complaining of those instructions in this Court. Sunkist, 370 U.S. at 25-27. Unlike Sunkist, Petitioners here failed to make the timely and specific objections which permitted this Court's analysis there of the jury charges. Id. at 26-27. Because the jury charges here are effectively impervious, all sets of circumstances -- all scenarios -- which the jury was told would lead to Petitioners' liability must be deemed legally correct, at least in this case. Moreover, under Sunkist, the jury's verdict must be read as tantamount to a finding of all liability scenarios within the scope of the jury instructions. Id. at 25-27.

B. Parker and Noerr-Pennington do not apply where there has been a subversion or circumvention of the Governmental process.

(i) Parker

This Court in Parker v Brown concluded that the Sherman Act prohibited individual and not state action, 317 U.S. at 352, while recognizing that in the case before it:

> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. Id. (citations omitted).

Parker thus signals this Court's view that conduct of the state itself in combination or conspiracy with private parties to restrain trade or establish monopolies is unlawful and unprotected under the Sherman Act because such conduct is not a valid act of government. This limitation upon the protection for state action has come to be known as the "co-conspirator exception." It also applies to immunity claimed under Noerr-Pennington. See infra at 38.

A number of federal courts, including this Court, have expressly recognized the co-conspirator exception to state action immunity. E.g., Commuter Transportation Systems, Inc. v Hillsborough County, 801 F.2d 1286 (11th Cir. 1986) (co-conspirator exception recognized; however, state action immunity found for airport authority with power to limit competition in limousine service where plaintiff failed to show injurious conspiracy); Greyhound Rent-A-Car, Inc. v City of Pensacola, 676 F.2d 1380 (11th Cir. 1982), cert. denied, 459 U.S. 1171 (1983) (plaintiff must prove an illicit conspiracy to exclude the entity from state action immunity); Whitworth v Perkins, 559 F.2d 378 (5th Cir. 1977), vacated, 435 U.S. 992, aff'd on rehearing, 576 F.2d 696

(5th Cir. 1978), cert. denied, 440 U.S. 911 (1979); (the mere presence of a zoning ordinance does not necessarily insulate the defendants from antitrust liability where the plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade). Subversion or circumvention of the legislative process is the underlying reason for the co-conspirator exception to Parker. This Court thus pointed out in California Motor Transport v Trucking Unlimited, 404 U.S. 508, 513 (1972), that "[c]onspiracy with a licensing authority to eliminate a competitor," or "bribery of a public purchasing agent" may violate the antitrust laws.

The essential point is that the joinder of private parties and governmental actors for their mutual personal benefit rebuts the presumption that governmental action is taken in the public interest.[24] Allied Tube, 486 U.S. at 503-04 (evidence may rebut the presumption that government acts in the public interest). The sort of behavior by public servants shown here amounts to nothing

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[24] This approach has explicitly been recognized by the Fourth Circuit, Judge Chapman writing:

> Actions taken to discourage and ultimately prevent competitors from meaningful access to the processes of administrative agencies fall within the sham exception to Noerr-Pennington immunity. Thus, proof that appellants conspired to bring the chairman of the Central Planning Council and an assistant attorney general into their conspiracy, with the intent to foreclose HBC [plaintiff] from meaningful access to the Central Planning Council and the MCC, is within the sham exception to Noerr-Pennington.

Hospital Building Co. v Trustees of Rex Hospital, 691 F.2d 678, 687 (4th Cir. 1982) (citations omitted).

less than a conspiracy with private persons for their economic benefit and the personal advantage of the conspiring officials. It results in the effective substitution of private business interests for true governmental judgment. When injury to competition results from this combination, no policy of the antitrust laws justifies this misconduct.

(ii) Noerr-Pennington

The Noerr-Pennington doctrine provides an exception to antitrust liability enabling citizens or business entities to influence or to petition public officials to take official action that will harm or eliminate competition. Eastern R.R. Presidents' Conference v Noerr Motor Freight, Inc. 365 U.S. 127 (1961); United Mine Workers v Pennington, 381 U.S. 657 (1965). These cases grew, in part, from the state action doctrine announced in Parker v Brown, on the theory that efforts to secure valid governmental action which was itself immune from antitrust attack should similarly enjoy immunity.[25]

In a recent decision involving the issue of whether joint efforts to influence the setting of a private electrical association's product standards, which were routinely adopted by state and local governments, qualified for Noerr immunity, this Court significantly clarified the sweep of the doctrine. In Allied

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[25] However, the fact that efforts to secure legislation are protected by Noerr-Pennington does not mean that the legislation ultimately enacted or conduct taken pursuant to such legislation will be shielded from antitrust review under Parker v Brown. The doctrines, while related, are treated separately by the courts.

Tube, 486 U.S. 499, the Court reviewed the rule of Noerr-Pennington and stated:

> The scope of this protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue. "[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action," those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. Noerr, supra. at 136; see also Pennington, supra. at 671. In addition, where, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is "incidental" to a valid effort to influence governmental action. Noerr, supra, at 143. The validity of such efforts, and thus the applicability of Noerr immunity, varies with the context and nature of the activity. (emphasis added).

In Allied this Court found a sham under Noerr-Pennington where a quasi-legislative process had been subverted and circumvented even though no crime was committed. See Hospital Building Co. v Trustees of Rex Hospital, 691 F.2d 678, 687 (4th Cir. 1982) (a private-public "conspiracy with the intent to foreclose [the plaintiff] from meaningful access to [a governmental body] is within the sham exception to Noerr-Pennington"); Racetrac Petroleum, Inc. v Prince George's County, 601 F.Supp. 892, 910 (D.Md. 1985), aff'd, 786 F.2d 202 (4th Cir. 1986).[26]

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[26] There the court said:

> In determining whether the challenged conduct is protected or sham, the court must initially decide whether the immediate objective of the actor was to achieve his anticompetitive purpose by obtaining legitimate governmental action or by abusing governmental process in order to prevent legitimate governmental decision-making. (emphasis supplied)...so understood, the sham exception serves the same purpose as the Noerr-Pennington doctrine of which it has become a part. The exception protects free speech and the governmental decision-making process by attaching liability to those

The dispositive issue is not whether government action is somehow "involved" in the challenged restraint, but whether the restraint originated in valid government, as opposed to private, action.[27] This Court thus in Allied Tube made clear that the Noerr-Pennington doctrine does not extend to "every concerted effort that is genuinely intended to influence governmental action." 486 U.S. at 503. See also Federal Trade Comm'n v Superior Court Trial Lawyers Ass'n, _____ U.S. _____, 110 S.Ct. 768, 776 (1990):

> If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports ... Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms ... Firms could claim immunity for boycotts or horizontal output requirements on the ground that they are intended to dramatize the plight of their industry

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> who would act to muffle the voices of competitors seeking access to government. (emphasis supplied).

601 F. Supp. at 910; accord Bieter Co. v Blomquist, 1990-1 Trade Cases, §69, 083 (1990 WL 107531) (D. Minn. 1990) (exploring the differences between protected "legitimate lobbying ...[that] produces an anticompetitive effect" and "illegal conduct").

[27] As the Fifth Circuit has noted, the presence of state participation in an antitrust claim signals not the conclusion of the inquiry, but rather "only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter. We reject 'the facile conclusion that action by any public official automatically confers exemption'." (citation omitted). Woods Exploration & Producing Co., Inc. v Aluminum Co. of America, 438 F.2d 1294 (1971), reh'g denied (1971).

and spur legislative action.

110 S.Ct. at 776, quoting Allied Tube, 486 U.S. at 503 (citations omitted).

The Petitioners asked for a charge based upon Affiliated Capital Corp. v City of Houston, 735 F.2d 1555 (5th Cir. 1984) (en banc), reh'g denied, 741 F.2d 766 (5th Cir. 1984), cert. denied, 474 U.S. 1053 (1986). J.A.____ . In Affiliated, cable TV contractors were selected by the city based on their "political power." Id. at 1557. The mayor "abdicated his responsibility," and the Fifth Circuit held that Noerr-Pennington immunity did not apply under a co-conspirator exception, even though the Plaintiff was nominally permitted to go before the city council. That en banc court applied the co-conspirator exception and/or the sham exception as necessary.

The policy behind the sham exception to Noerr-Pennington is that competitors in OMNI's (Affiliated's) position would become totally lost if it were permissible for the government to become part of a conspiracy, hold meaningless hearings or other proceedings, and then purport to "decide" what had already been determined (for reasons having nothing to do with the public trust) by the private co-conspirators in concert with the public officials who were perverting their offices. The sham exception does not come into play except when the rules of competition have been shredded by government and private actors conspiring.[28] The sham

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[28] Petitioners also attempt to argue that the only co-conspirator exception to Parker ought to involve situations in which the government is in effect an enterprise partner

exception to Noerr-Pennington (or the co-conspirator exception) is thus the flip side of the Noerr-Pennington coin. (See, supra n.26).

As in all "sham" exception cases, Respondent's damages flow from the denial of access to valid governmental process brought about by Petitioners' illegal agreement -- not from any one governmental action or piece of legislation. See Allied Tube, 486 U.S. at 499-500. That is, OMNI's damages were caused by the City/COA secret agreement to take whatever action was required -- not by one ordinance or another. Thus this case, like all "sham" exception cases, has nothing to do with the cases on which Petitioners rely, where inquiry into legislative motive, for the purpose of setting aside legislation, is eschewed. See Pet. Brief at 19-20.

Respected commentators agree that Noerr-Pennington immunity simply does not apply here. As Professor Areeda puts it:

> 'Conspiracy' is not inapt where the member(s) of an official agency
>
> (1) Accepts a bribe;
> (2) Decides out of personal bias and for no other reason;
> (3) Decides in favor of a personal financial interest in

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with the private conspirator. (See Pet. Brief at 18-19). They erroneously cite to 1 P. Areeda & D. Turner, Antitrust Law, §212c, in support of this proposition.

Areeda and Turner were pointing out that such a situation was only one of several situations in which there would be no immunity. As they had previously written on the same page: "the quoted language reminds us that the Court was not eliminating all antitrust applications where state law or action is involved, that preexisting limits were not being overruled, and that room was reserved for future elaboration and development." (Id.)

> privity with or perhaps even closely allied to that of one or more of the plaintiff's rivals, whether on the board or not. (P. Areeda & D. Hovenkamp, Antitrust Law, Par. 203.3a, 203.3c, 1987 Supp., p.33)

These concerns, as documented by the evidence and verdict here, are particularly appropriate at the local government level, where the safeguards that tend to produce fair political decision making are often either tenuously present or entirely absent. (cf. Allied Tube, 492 U.S. at 502-03).[29]

Both cases and commentaries concur that heightened scrutiny of municipal government action is appropriate. Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L.Rev. 837, 853-857 (1983) (Reasonable guarantee of due consideration to the public interest in large legislatures does not apply with regard to local legislative bodies).[30] See, also,

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[29] Petitioners themselves acknowledge that the precipitous, knowingly illegal and unconstitutional act of the City in passing the initial moratorium against the advice of the City Attorney who told the Council of its unconstitutionality may suffice by itself to invoke the "sham" exception to Noerr-Pennington. (See Pet. Brief at 35, n.26.)

[30] As Rose observes:

> However much or little local governments may structurally resemble the Federalist legislature in general, they are very unlikely to be restrained by the Federalist safeguards in making specific piecemeal land decisions. In making these decisions, which involve only a few interested parties meeting only on single issue, legislatures are restrained neither by a coalition-building process that assures the fairness of the decisions, nor by a clash of interests that gives time for sober consideration. Courts should therefore not assume that these safeguards have worked. If these decisions are to be found reasonable, the finding

McDonald v Board of Comm'rs, 238 Md. 549, 210 A.2d 325 (1965) (Barnes, J., dissenting) (discussing political corruption in connection with local zoning decisions); Cf. Chrobuck v. Snohomish County, 78 Wash. 858, 865, 480 P.2d 489, 494 (1971) (contact between the company and zoning commissioners caused invalidation of the zoning decision); see also Hovenkamp and Mackerron, Municipal Regulation and Federal Antitrust Policy, 32 UCLA L. Rev. 719, 782-783 (1985); Deutsch, Antitrust Challenges to Local Zoning and Other Land Use Controls, 60 Chi. - Kent L. Rev. 63, 87-88 (1984) (antitrust laws should apply when governments are involved in "corruption, improper influence for the benefit of private individuals, and official's self-dealing"); and C. Haar & J. Kayden, Landmark Justice (1989).

Congress itself, through enactment of the Local Government Antitrust Act, 15 U.S.C. §§34-36, has recognized that municipalities may subject themselves to antitrust liability for their anticompetitive conduct. Although a municipality may obtain relief under the Act from damages liability for its antitrust violations, the municipality remains liable nonetheless and may be subject to equitable measures. Id.[31] Moreover, the relief from

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requires some alternative source of fairness and due consideration. Rose, Planning and Dealing. Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L. Rev. 837, 856 (1983).

[31] The District Court here granted the City's motion for exclusion of damages liability, but let the issue of their liability for injunctive relief go to the jury. The Fourth Circuit properly directed the District Court, on remand, to fashion such relief.

damages afforded by the Act in no way extends to non-governmental co-conspirators, who remain fully liable for the damages caused by their conspiracy with public actors. Id.; see Dennis v Spark, 449 U.S. 24 (1980) ("no good reason for conferring immunity on private persons who persuaded the immune judge to exercise his jurisdiction corruptly").

(iii) PROOF OF SUBVERSION OR CIRCUMVENTION

The Fourth Circuit held that the following inferences, as examples, were amply supported by the jury verdict in view of the jury charges and the evidence (the sufficiency of which is not at issue):

a. The City was not acting pursuant to the direction or purposes of the South Carolina statutes but conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry. (Pet. App. 9a).

b. Petitioners engaged in "private contacts and agreements [that] relate not to the purpose of attaining governmental action but solely to forcing competitors from a particular market." (Pet. App. 12a).

c. "[T]he facts support a jury conclusion that COA's interaction with the mayor, City Administrators and members of the Council 'was actually nothing more than an attempt to interfere directly with the business relations of a competitor' or an attempt to harass and deter OMNI ...[and] that COA's purposes were to delay OMNI's entry into the market and even to deny it a meaningful access to the appropriate city administrative and legislative fora. The evidence, for example, supports inferences that COA instigated the Council's enactment of an unconstitutional ordinance even though the city attorney had advised of its probable unconstitutionality, and that COA encouraged the City's later instruction to its attorney to proceed with litigation to stall until a moratorium could be enacted." (Pet. App. 22a) (emphasis supplied).

d. "[T]he jury verdict ... necessarily reflected its findings that COA's actions were a 'sham' and, construing the evidence with appropriate deference to the verdict, it supports that finding." (Pet. App. 23a).

These actions by COA and the City, as conclusively established by the jury verdict, show a clear subversion and/or circumvention of the government process. Neither subversion nor circumvention of government is protected by Parker or Noerr-Pennington.

II. CORRUPTION OF THE GOVERNMENTAL PROCESS SUSTAINS THE JUDGMENT

This Court has never recognized any immunity from antitrust liability under Parker or Noerr-Pennington for the corrupt use of governmental process. The abandonment of public responsibilities to private interests surely amounts to the corrupt use of governmental power. In Allied Tube, this Court recognized bribery or corruption of governmental process as being within the sham exception to Noerr-Pennington. 486 U.S. at 504. Again in Allied, this Court held that proof of "personal financial interests" on the part of public officials who impose restraints on trade means "that the restraint has resulted from private action," Id. at 502, unprotected by Parker. The Court of Appeals dissent acknowledged that both Parker and Noerr-Pennington immunities would be defeated by proof of illegal or fraudulent actions, or corrupt or bad faith decisions, or selfish or corrupt motives by Petitioners. (Pet. App. 44a, 48a). Petitioners themselves concede that proof of what they call "direct corruption," including bribes and personal financial interest, would show a "deviation from the legislators'

presumed attention to the public interest," which would negate Parker. Still other federal courts, and this Court, have recognized the co-conspirator exception to Parker. See supra at p. 29. At bottom, however, it was within the jury's province to determine what constituted corruption of the governmental process in their community. In response to the express invitation of Petitioners' closing arguments to decide the case on the question of corruption, the jury returned a verdict against Petitioners that has a finding of corruption well within its ambit.

A. Failure to request pertinent jury instructions precludes this Court's review of the Questions Presented of Petitioners.

Although Petitioners argued to the jury that this case was about political corruption,[32] they did not properly request a charge that only "direct corruption" (Pet. Brief at 12, 24-25, 27) would support a verdict against them. See supra at n.9. They thus have not preserved, for this Court's review, the question of whether proof of "direct corruption" alone defeats Parker and

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[32] Respondent likewise treated corruption as part of this case all along. See, Resp. Answer to (4th Cir.) Pet. for Rehearing at 5 ("Appellees ... completely ignore the evidence of corrupt motivation and mutual back scratching ... which motivated the 1980 agreement to preserve the corrupt agreement between the City and COA ...") (4th Cir.) Brief for Appellant at 19 (Petitioners' "scheme designed to shore up and perpetuate their illegal and mutually beneficial activities") and at 40 ("The City Officials and COA both benefited in corrupt ways from their mutual back scratching."); Resp. Summary Judgment Opposition Memorandum at 8 ("...illegal contacts with members of City Council"); and at 13 ("... the City and COA were engaged in mutual back scratching").

Noerr-Pennington immunities. See supra at p. 26.

B. Parker and Noerr-Pennington do not apply because of the proof of illegal, fraudulent, corrupt, bad faith or selfish actions by Petitioners.

In view of the policies illuminating both Parker and Noerr-Pennington, the finding of corruption embraced by the jury's verdict properly could have rested on proof of the City's abandonment of its public responsibilities. Quite apart from that, however, proof of illegal or fraudulent action, or corrupt or bad faith decisions, or selfish or corrupt motives by Petitioners was well within the scope of the jury's verdict. See supra at p. 25. Surely this amounts to proof of what Petitioners call "direct corruption" of the governmental process which Petitioners themselves concede would sustain the judgment. (Pet. Brief at 12, 24-25, 27). That concession by Petitioners is consistent with, and mandated by, this Court's decision in Allied and the law as acknowledged by both the majority and the dissent in Fourth Circuit.

The jury finding of corruption results not just from the instructions concerning, inter alia, "illegal agreements" and "illegal arrangements," or from the evidence, or from Petitioners' closing argument inviting the jury's decision on the "corruption" issue. Beyond the instructions, the evidence and the summation, the jury was empowered to bring its common sense and logic to bear in deciding this case. Plainly the jury's common sense and logic could have led it to conclude that what this case revealed was, in Petitioners' words, "government corruption. No matter how you

slice it." J.A.____ [Tr. at 2449].

Several other factors reinforce the reasonableness of the jury's appraisal. For example, the standards that would have guided a jury in determining government corruption under the Hobbs Act, 18 U.S.C. §1951, were satisfied here. United States v. McCormick, 896 F.2d 61, 66 (4th Cir. 1990), cert. granted, _____ U.S. _____ (1990). As the Fourth Circuit said:

> "if payments to elected officials are not treated as legitimate campaign contributions by either the payor or the official, then a jury may reasonably infer that these payments are also induced by the official's office in violation of the Hobbs Act," [setting standards for assessing the legitimacy of campaign contributions, including:] "(1) Whether the money was recorded by the payor as a campaign contribution, (2) whether the money was recorded and reported by the official as a campaign contribution, (3) whether the payment was in cash, (4) whether it was delivered to the official personally or to his campaign, (5) whether the official acted in his official capacity at or near the time of the payment for the benefit of the payor or supported legislation that would benefit the payor, (6) whether the official had supported similar legislation before the time of the payment, and (7) whether the official had directly or indirectly solicited the payor individually for the payment.);

The jury had heard evidence from Mr. Cantey, for example, that he understood that if a company did favors -- such as providing free or reduced-cost billboard space -- for a politician, it expected the politician to do favors in return: a classic Hobbs Act "quid pro quo." United States v Barber, 668 F.2d 778, 784 (4th Cir. 1982) (providing free liquor to government officials in return for "favors" violated the Hobbs Act). (Cf. United States v. Dozier, 672 F.2d 531 (5th Cir. 1982)). Further, there was no doubt that such favors were provided by COA to politicians, including specifically the City politicians here involved. The jury from

this had reason to find a pattern and practice of the City and COA exchanging favors. United States v. Aguon, 851 F.2d 1158 (9th Cir. 1988) (en banc); United States v. Mazzei, 521 F.2d 639 (3d Cir. 1974) (en banc), cert. denied, 423 U.S. 1014 (1975). The provision of free or reduced-price, strategally-placed billboard space in return for control of access to the market -- since at least 1980, and with regard then to another competitor, according to the proof before the jury (Pet. Ann. 13a) -- clearly establishes the motive and inducement.[33]

As members of the same community as Petitioners, moreover, the jurors may well have understood that corruption is a way of life

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[33] Inducement can be inferred, of course, from an expectation of mutual back-scratching even in the absence of express inducement by the officeholder. Moreover, the payments still amount to government corruption in the form of bribery. Cf. U.S. v Aguon, 851 F.2d 1158 (9th Cir. 1988) (en banc). Judge Aldisert of the Third Circuit explained the distinction in dissent in United States v. Cerilli, 603 F.2d 415, 435 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980):

> A public official charged with extortion under the Hobbs Act should be able to argue that although he did in fact receive something of value, it was given at the initiative of the donor, and not as a result of force, fear or duress emanating from the defendant. Thus, in an indictment for extortion, it is logically and jurisprudentially sound to permit a defense of bribery. To hold otherwise is to blur completely the distinction between the two crimes.

Of course, the crimes are still crimes. And they both amount to "government corruption. No matter how you slice it."

in political South Carolina.[34] In using their common sense to fit together the evidentiary puzzle in this case, the members of the jury may have used that understanding to reach the conclusion, implicit in their general verdict, that Petitioners here had corrupted the municipal government process.

Indeed corruption, if that be deemed the test, is undoubtedly established by the abandonment and relinquishment of governmental responsibilities to a private monopolist. This was clearly demonstrated by the 1980 secret agreement to allow COA to use the City's resources and power to ensure COA's monopolistic position and the City Council members their politically crucial, free and/or discounted, strategically-placed, and/or stolen billboard space.[35]

A fundamental point for this Court is both simple and clear: whether the conduct of Petitioners be called "directly corrupt," "corrupt," or "subversion or circumvention of the governmental process," the end result is the same -- OMNI has been unfairly, wrongly, and without any policy justification deprived of the right to compete in the outdoor advertising market in Columbia, S.C.. OMNI has been denied the right to compete unhampered by

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[34] E.g., There is a current Hobbs Act investigation and prosecution of members of the South Carolina legislature in Columbia, focusing on bribery and corruption among legislators and perhaps other State officials. N.Y. Times July 22, 1990, Section 1, page 16.

[35] Corruption of governmental process through an illegal conspiracy is illegal advocacy and not protected by the 1st Amendment as Petitioners concede. (Pet. Brief at 32).

governmental coercion resulting from an abuse of the public trust through a conspiracy. Petitioners wish to have this Court articulate a "direct corruption" standard setting out a "bright line" rule to serve the interests advanced by certain amici. Respondent submits that this would do no favor to the nation, since exclusion from competition through subversion or circumvention is no less harmful than is exclusion through "direct corruption" as Petitioners seem to suggest. Respondent does not believe that the "direct corruption" test would be any simpler than the existing guideline of subversion or circumvention of the governmental process.

However, Respondent respectfully submits that whatever the approach taken by this Honorable Court, the evidence upon which the jury found a conspiracy meets that requirement.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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